No. 95-1184

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER,

v.

WILEMAN BROS & ELLIOTT, INC., ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE U.S. SOLICITOR GENERAL'S PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Amici (set forth individually in Appendix A) hereby respectfully move for leave to file the attached brief of Amici Curiae. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but has not been given.

The interest of the Amici in this case arises from the fact that they are individual producers and agricultural groups who support commodity promotion and research programs . Some are commodity promotion and research programs themselves, including several currently involved as parties to cases pending in the U.S. District Court for the Eastern District of California in which the same issue is before the Court, namely, whether statutorily created programs using mandatory assessments for the generic promotion of agricultural commodities impermissibly infringe on the First Amendment rights of producers. Bidart Bros. v. California Apple Comm'n., No. CV-F-94-6018-OWW (E.D. Cal.); Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n., No. CV-F-95-5428-OWW (E.D. Cal.); Matsui Nursery, Inc. v. California Cut Flower Comm'n., No. CV-S-96-102 EJG (E.D. Cal.). One entity among the Amici is currently a party to a case in California state court in which identical issues have been raised. California Kiwifruit Comm'n. v. Moss, No. C018368 (3d Dist. Cal.App.).

In the instant case in the Court of Appeals, the arguments focused primarily on the proper application of the test articulated in Central Hudson Gas & Electric Corp. v. Public Service Comm'n., 447 U.S. 557 (1980). Further, the

discussion in the Court below was limited to commodity promotion and research programs created under federal law. The Amici believe that the brief they are requesting permission to file will assist the Court by calling into question the applicability of the Central Hudson standard at all, and through presentation of information regarding the breadth and importance of these programs operating under both state and federal law, and how their operations are being impacted by the Ninth Circuit's decision in the instant case. The Amici believe this will assist the Court in seeing the national importance and commensurate need for Supreme Court review in this matter.

Dated: March 22, 1996 Respectfully Submitted,
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This brief in support of the Petition for a Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996, is respectfully presented on behalf of the Amici.

I. SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly relied upon the standard set forth in Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York, 447 U.S. 557 (1980) in declaring the federal peach and nectarine programs at issue in Wileman Bros. & Elliott, Inc., et al. v. Espy, 58 F.3d 1367 (9th Cir. 1995) ("Wileman") to be unconstitutional. Further, even if the Central Hudson test was somehow appropriate, it was misapplied through the use of a comparative efficacy analysis to determine whether the programs "directly advance" the governmental interest.

The Amici write to emphasize the devastating impact of the Ninth Circuit's First Amendment analysis on agricultural commodity promotion and research programs throughout the United States. If not reversed, this standard has the potential to end all programs under both federal and state law in the Ninth Circuit. The decision will also imperil all national federal programs which authorize assessments for commodities produced in the Ninth Circuit and leave unreasonable uncertainty and confusion in the nation's agricultural industry for many years to come.

The Ninth Circuit's error was caused by a fundamental misunderstanding of the governmental purpose underlying agricultural commodity promotion and research programs. There is clear legislative intent establishing that these programs are authorized to generate industry-wide benefits rather than measurable gain to any specific individual. The failure of the Ninth Circuit to recognize and give appropriate deference to the correct governmental interest results in the articulation of a "standard" that exacerbates the uncertainty left in the wake of its earlier decision in Cal-Almond, Inc. v. USDA, 14 F.3d 429 (9th Cir. 1993) ("Cal-Almond I"). Specifically, the Wileman holding:

- disregards the governmental nature of commodity promotion and research programs and the fact that governmental speech does not implicate First Amendment freedoms.

- is at odds with 40 years of U.S. Supreme Court jurisprudence concerning the compelled support aspects of union or agency shop agreements.
- creates questions regarding the application of the strict scrutiny standard as articulated in Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).
- is founded on a use of the intermediate test from Central Hudson for a purpose quite different from that for which the test was developed.
- relies on an application of the Central Hudson test which is wholly inconsistent with any analysis ever utilized by this Court.
- results in the creation of an impossibly stringent standard with no legal or policy justification.
- leaves commodity promotion and research programs, including the Amici, unreasonably exposed to continuing costly litigation by failing to clearly articulate an appropriate standard.

Finally, there is in the wake of the Wileman decision considerable legal confusion over what question was asked and what was answered. In the union or agency shop context this Court has dealt differently with challenges to the facial validity of compelled financial support, as such, and claims based on specific activities funded by mandatory assessments. Exactly which situation is at issue here is not clear. The Amici believe only this Court can resolve this uncertainty by articulating a clear distinction between the "facial" type challenge to compelled financial support, without more, and the "as applied" claims based on the use of mandatory assessments for specific activities.

II. INTRODUCTION/INTEREST OF THE AMICI

The Amici are mandatory agricultural commodity promotion and research programs ("Program Amici") operating under state law throughout the United States, members of the California tree fruit industry, including peach and nectarine growers, who are directly affected by the decision in Wileman, members of the California almond industry who are directly affected by the decisions in Cal-Almond I and Cal-Almond, Inc. v. USDA, 67 F.3d 874 (9th Cir.

1995) ("Cal-Almond II")[1] and numerous agricultural groups which support the continued existence of these programs[2]. There are today more than 250 commodity promotion and research programs operating under state law in the United States. O. D. Forker and R. W. Ward, Commodity Advertising: The Economics and Measurement of Generic Programs, 183, Lexington Books (1993).

These programs have combined budgets of approximately $500 million. In California alone, the total "farm-gate" value of commodities investing in these programs exceeds $12 billion. In Washington, commodities covered by state programs represent more than $4 billion in farm-gate value. Nationally, it has been estimated that the farm revenue derived from commodities covered by research and promotion programs is in excess of $100 billion. H. W. Kinnucan, Economics of Mandated Commodity Promotion Programs: An Overview and Guide to the Literature, 2 (1995).

While the specific structures of the numerous programs operating in the various states differ slightly and may be distinguishable in some aspects from their federal counterparts, they are all patterned after programs like the federal marketing orders at issue in the instant case. Accordingly, as set forth in detail below, all of the Program Amici are currently subject to significant adverse impacts resulting directly from the Ninth Circuit's decision in Wileman.

Like the federal programs at issue in Wileman, the Program Amici rely on mandatory assessments and operate under authority granted by the legislative branch of their respective state governments. They are not implemented, however, until approved by a vote of those

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[1] The original 1993 Cal-Almond Ninth Circuit opinion dealt with the First Amendment issues. The 1995 Cal-Almond II case dealt with the remedies required by the first decision after remand to the District Court. Cal-Almond II held that the assessments for generic advertising, like those imposed in Wileman, must be refunded to those whose First Amendment rights were violated. Cal-Almond II was decided on October 10, 1995. A request for rehearing before the panel and a suggestion for hearing en banc, filed by Cal-Almond, Inc. and the other Plaintiffs-Appellees was denied on February 20, 1996. A final judgement has not yet been entered in the case which has so far involved the two appeals.

[2] A complete list of the Amici is set forth in Appendix A.

who will be subject to the assessments. They exist at the sufferance of those who implemented them and may be voted out of existence at regularly scheduled referenda or a vote held upon a petition from producers[3].

Also similar to the programs at issue in Wileman is the idea of producer management with governmental supervision. Typically, producers make up the program Board of Directors and guide its policies. Members of these policy making boards are generally either elected by those within the industry or nominated by industry members for appointment by the United States Secretary of Agriculture or by the head of the relevant state's department of agriculture.

The authority of the industry board is however, subject to significant governmental oversight. Typical statutory schemes authorizing these programs require budgets to be approved by government officials. It is also common to require statements of contemplated activities or planned actions to be submitted to the government officer overseeing the program for approval as well.

In addition to governmental review of future actions, these programs are generally subject to cease and desist orders to halt acts which are beyond program authority or contrary to the public interest. This authority generally also allows government officals to remove any member of the governing board or to demand termination of program employees under specified conditions.

The intent of the Congress and various state Legislatures enacting the laws authorizing these programs provides yet another similarity between the Program Amici and those marketing orders at issue in Wileman. In enacting the Agricultural Marketing Adjustment Act of 1937 (7 U.S.C. § 601, et seq.) Congress declared these programs to be necessary to prevent:

> . . . (D)isruption of the orderly exchange of commodities in interstate commerce (which) impairs the purchasing power of

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[3] Although most programs directly affect producers, some impact handlers, processors or shippers. Throughout this brief those subject to these programs are referred to simply as "producers."

> farmers and destroys the value of agricultural assets which support the national credit structure .... 7 U.S.C. § 601.

This sentiment has been echoed by states across the nation. For example, the California Legislature, also in 1937, pointed to a need for state programs such as the Amici to alleviate conditions which "result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "prevent producers from retaining a fair return from their labor, their farms and the commodities which they produce." California Food and Agricultural Code Section 58651. California underscored this intent and reaffirmed the need for these programs last year with the adoption of Assembly Bill 1563 (Stats. 1995, c. 727) which reads in part:

> (These programs) (a)re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global market place. California Food and Agricultural Code Section 63901(e).

The Washington State Legislature cited similar concerns in adopting that state's Agricultural Enabling Act of 1961 declaring that the programs were necessary to:

> ... (P)rovide methods and means ... for the maintenance of present markets and for the development of new or larger markets, both domestic and foreign, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market; ... (and) eliminate or reduce economic waste in the marketing and/or use of agricultural commodities; ... (and) restore and maintain adequate purchasing power for the agricultural producers of this state .... Washington Revised Code Section 15.65.040.

The Program Amici are also similar to the programs at issue in Wileman in their use of the funds collected. Promotional activities typically account for the bulk of the money spent with lesser amounts going to production and market research and producer relations.

Although the amounts vary greatly from program to program reflecting specific industry needs, it is not unusual to see promotional activities comprising 65-75 percent of program expenditures. Kinnucan, supra, 2. It is precisely because the producers directing these programs have identified promotion as their industries' greatest need that the Amici are extremely concerned by the Ninth Circuit's decision in Wileman.

In addition to programs operating under state law and federal marketing orders like those at issue in Wileman, several commodity groups operate national promotion programs established under commodity-specific federal legislation. Commodities with active national programs include dairy, beef, soybeans, pork, cotton, potatoes, eggs, sheep, honey and watermelons, as well as mushrooms, pecans and limes. See United States v. Frame, 885 F.2d 1119 at 1122 (3d Cir. 1989). These national programs operate through mandatory assessments specific to each individual commodity.

Each of these national commodity programs has a nexus in California where all of these commodities are produced. Therefore, a decision by the Ninth Circuit necessarily impacts all of these national marketing orders. This underscores the fact that the potential impact of both the Cal-Almond I and the Wileman decisions is national in scope. These decisions could cause the dismantling of the advertising programs under all federal marketing orders, federal free-standing legislation and many state enacted programs.

In the California peach and nectarine industries directly affected by the programs at issue in the instant case, most producers do not market their own fruit to the consumer. If the generic advertising program is done away with, these producers will be without adequate resources to increase consumer awareness and consumption of their product. In the almond industry, only the largest producers with established brands would have the resources necessary to promote their products on a national scale.

In studies and tests concerning the demand for almonds, which included information on advertising expenditures, it has been determined that advertising has had a significant positive impact on the demand (and price) for California almonds. It has been estimated that annual marginal rates and returns related to almond

advertising were generally well over three hundred percent (300%).[4] As demand increases, more acres are planted leading to an overall rise in productivity, thus creating the stability that is one of the stated goals of the Agricultural Adjustment Act of 1937. (7 U.S.C. § 601, et seq.)

Agricultural commodity promotion and research programs across the country have proven to be very effective in raising consumption and stabilizing prices through increased public awareness. These programs have met the stated goals of the authorizing legislation, and should not be dismantled by the erroneous application of the Ninth Circuit's overly restrictive Cal-Almond I and Wileman standard.

III. ARGUMENT

The Amici believe the Wileman decision rests in large part on the Ninth Circuit's misconception of the governmental interest underlying commodity promotion and research programs. The Ninth Circuit appears to have based its decision on a belief that the government's purpose was to produce a measurable benefit to a specific individual. A careful reading of the statutes reveals an intent to confer benefit on an industry-wide, rather than individual, scale.

The State of California has specifically declared that commodity promotion and research programs operating under that state's laws are "intended to provide benefit to the entire industry." California Food and Agricultural Code Section 63901(c). Washington has set forth similar intent in authorizing creation of the Washington Apple Commission "because the stabilizing of the apple industry" was necessary to accomplish the Legislature's goals. Washington Revised Code Section 15.24.900(6).

The Ninth Circuit's fundamental misunderstanding of the governmental interest to be advanced by these programs resulted in a misapplication of the Central Hudson standard. The result is an unclear decision which is inherently flawed in the following respects:

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[4] Statement of Jason E. Christian, Professor Ag Economics, U.C. Davis; Reprinted in Kinnucan, supra, 828.

1. The holding does not provide any finality to the question of a program's constitutionality. Obviously, under the "test" articulated in Wileman, a program may find itself constitutional as to one grower and at the same time unconstitutional as to another. Similarly, a program may be valid one year and invalid the next due entirely to market forces beyond anyone's control.

2. The holding provides no guidance to the volunteer directors of these programs as to how to conduct themselves to avoid impermissible constitutional infringement. Under the Ninth Circuit approach, the constitutional validity of a program appears to turn as much on the marketing skills, or imagination, of the challenger as on any attribute of the challenged program.

3. The holding may have eliminated the ability for growers to create new programs or affect significant changes to existing ones. A new program obviously has no track record or established history of efficacy which can be compared to the efforts of a challenger. Accordingly, application of the Wileman "test" could make it impossible to create any new programs. Similarly, it is unclear whether an existing program making substantial changes to better serve its producers would be able to rely on its history of effectiveness, or would instead, be treated as a new program. See In Re: Cal-Almond, Inc., et al., 94 AMA Docket No. F&V 981-1, Decision and Order, filed June 15, 1995.

The flaws inherent in the Ninth Circuit decision leave significant unanswered questions and create unreasonable uncertainty. This situation has a chilling effect on these vital programs. Many boards of directors are now apprehensive of making adjustments to their programs in response to changing market conditions and industry needs for fear of finding themselves without a sufficient history of effectiveness.

Further, challengers have used the Wileman holding to obtain preliminary injunctions creating escrow accounts into which their assessments are paid pending final adjudication. This loss of funding can have a crippling effect and severely hampers the program's ability to continue implementation of efficacious activities on behalf of producers. This "death by inches" all occurs before any final adjudication on the merits. See e.g., Bidart Bros. v. California Apple

Comm'n., No. CV-F-94-6018-OWW, Slip Op. at 14 (E.D. Cal., Dec. 1, 1994).

Potential challengers view the decision of the Ninth Circuit as creating a virtually impossible standard and have declared open season on these programs. As the Solicitor General points out (Petition at 21 and 29), challenges to state and federal programs are pending across the country. Further, in a recently published law review article, counsel for many program challengers declares that more litigation should be expected. The article goes so far as to state that "challenges are likely with respect to milk, artichokes, cut flowers and nursery plants." B. Leighton, The Socialization of Agricultural Advertising: What Perestroika Didn't Do the First Amendment Will, 5 S.J. Agri. L. Rev. 49, 51-52, fn. 19. As noted by the Solicitor General (Petition at 29, fn. 22) the threat to cut flowers has become reality. Matsui Nursery Inc., et al. v. California Cut Flower Comm'n., No. CV-S-96-102 EJG (E.D. Cal. filed January 17, 1996.)

The Amici are in agreement with the Solicitor General's assertion that the correct standard to be applied in analyzing these programs is that found in Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Keller v. State Bar of California, 496 U.S. 1 (1990). The Amici believe however, that there is in fact a two-step test set forth in those cases.

The line of cases descending from Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225 (1956) and Lathrop v. Donohue, 367 U.S. 820 (1961) teaches that before resort is had to the "chargeable activities" test set forth by the Solicitor General (Petition at 18) the Court must first determine the validity of compelled financial support as such. Hanson, supra, 351 U.S. at 238; see also Ellis v. Railway Clerks, 466 U.S. 435, 439 (1984) ("(Petitioners) do not contest the validity of the union shop as such, nor could they (citing Hanson). They do contend, however, that they can be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances ... ."); Chicago Teachers Union v. Hudson, 475 U.S. 292, 294 (1986); Keller v. State Bar of California, supra, 496 U.S. at 8-9; Lehnert v. Ferris Faculty Ass'n., 500 U.S. 507, 516-517 (1991).

The initial test for the validity of compelled financial support, as

such, has been identified as requiring only that the regulation be "rational." Roberts v. U.S. Jaycees, supra, 468 U.S. 609, 637-638 (1984) (O'Connor, J., concurring in part and concurring in the judgment). However, the Amici believe that the "Hanson test" as applied in Keller requires that the regulation in question be a relevant and appropriate legislative response to a substantial governmental interest. Hanson, supra, 351 U.S. at 233-234 and Keller, supra, 496 U.S. at 8-9. Accordingly, the Amici believe this is the standard by which the concept of compelled financial support of agricultural commodity promotion and research programs, as such, should be judged.

IV. CONCLUSION

The uncertainty created by the Wileman decision and the multiplicity of lawsuits that it encourages will unnecessarily subject the Amici to unreasonable legal costs to defend against repeated claims. The situation will also divert producer dollars from the statutory mandate of these programs by tying them up in pre-judgment escrow accounts to the point that the programs and the will of a majority within the industry will be hamstrung by a vocal minority. The Wileman approach will encourage vexatious claims and dilatory tactics as challengers attempt to limit the effectiveness of the programs and theoretically strengthen their arguments.

For all of the reasons set forth herein, the Amici respectfully, and strenuously, recommend that the Court grant the U.S. Solicitor General's Petition for a Writ of Certiorari.

Dated: March 22, 1996

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APPENDIX A

American Mushroom Institute
California Alfalfa Seed Advisory Board
California Apple Commission
California Asparagus Commission
California Artichoke Advisory Board
California Avocado Commission
California Cantalope Advisory Board
California Celery Advisory Board
California Cherry Advisory Board
California Cling Peach Advisory Board
California Cut Flower Commission
California Date Commission
California Dry Bean Advisory Board
California Egg Commission
California Forest Products Commission
California Fresh Carrot Advisory Board
California Grape and Treefruit League
California Grape Rootstock Improvement Commission
California Kiwifruit Commission
California Melon Research Board
California Pear Advisory Board
California Pepper Commission
California Pistachio Commission
California Plum Marketing Board
California Potato Research Board
California Strawberry Commission
California Table Grape Commission
California Tomato Advisory Board
California Walnut Commission
California Wheat Commission
Tony Campos
Campos Bros. Farms
Ken Cunningham
Harris Woolf California Almonds
Hughson Nut Marketing

Idaho Potato Commission
International Apple Institute
Lodi-Woodbridge Winegrape Commission
National Potato Council
North American Blueberry Council
Panoche Creek Farms
Paramount Farms
Pennsylvania Apple Marketing Program
Ned Ryan
Ryan Perreira Almond Co.
Virginia Apple Growers Association
Washington Apple Commission
Washington Potato Commission